UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWNING-FERRIS INDUSTRIES
OF CALIFORNIA, INC., D/B/A/ BFI NEWBY
ISLAND RECYCLERY,

Employer,

and Case 32-RC-109684

FPR-II, LLC, D/B/A LEADPOINT
BUSINESS SERVICES,

Employer,

and

SANITARY TRUCK DRIVERS AND
HELPERS LOCAL 350,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Petitioner.

PETITIONER'S OPENING BRIEF

In Support of Review of the Acting
Regional Director's Decision and Direction of Election

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I. INTRODUCTION

Petitioner Teamsters Local 350 ("Union") seeks to represent all full-time and regular part-time employees jointly employed by FPR-II, LLC, d/b/a Leadpoint Business Services ("Leadpoint"), a temporary staffing agency, and Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery ("BFI"), the client employer to whom Leadpoint supplies employees. The petitioned-for unit employees work at BFI's Recyclery in Milpitas, California ("unit employees"), and it is not disputed that they are employed by Leadpoint or that they constitute an appropriate unit for collective bargaining. The sole issue on appeal is whether BFI jointly employs them.

The issue presented is of broader importance than this particular petition, as it entails the Act's treatment of so-called leased, contingent, temporary or "flexible" employees who are provided by a staffing agency, or "supplier-employer," to perform work required by their host, the "user-employer." Often in such arrangements, and as presented here, the supplied employees perform work central to the user's operations and business. The user-employer, both contractually and necessarily, retains control over the performance of their work. These arrangements, which have become prevalent in the American workplace,[1] are not a form of sub-contracting in the traditional sense of the word, whereby one company pays another to complete

[1] This past June, the Labor Department reported that our nation's employers utilize more temporary and staffing agencies than ever before: 2.7 million, while working conditions and standards declined. Michael Grabell et al., *Temporary Work, Lasting Harm*, Dec. 18, 2011, [available at http://www.propublica.org/article/temporary-work-lasting-harm] (Temporary workers labor under uncertain and increasingly perilous conditions. In California, temporary workers are injured at an approximately 50% greater rate than regular, full-time employees.); Michael Grabell, *The Expendables: How the Temps Who Power Corporate Giants Are Getting Crushed*, ProPublica, June 27, 2013 [available at http://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushe]; *see also* Tian Luo, Amar Mann, & Richard Holden, Bureau of Labor Statistics, U.S. Dep't of Labor, The Expanding Role of Temporary Help Services from 1990 to 2008, Monthly Labor Review 12 (August 2008) ("The tremendous growth of temporary help services has been driven by the flexibility and low labor cost of temporary workers. From 1990 to 2008, total temporary employment in the United States went from 1.1 million to 2.3 million, and in 2008 it represented 1.7 percent of total U.S. employment.") [available at http://www.bls.gov/opub/mlr/2010/08/art1full.pdf]. Due to the increasing number of injuries, OSHA has launched a temporary worker initiative. *See* https://www.osha.gov/temp_workers/index.html).

a specific task without involvement or entanglement between the two. Rather, BFI, like many other employers, has 'subcontracted' the employment relationship itself, and nothing else.

Thoughtfully adopting a joint employment standard under these circumstances is necessary to the vitality of the Act. Unfortunately, to date the Board has not done so, leaving a large swath of American workers without an effective resort to the processes and procedures guaranteed by the Act to workers who enjoy a more traditional employment arrangement.

Here, the Regional Director determined that Leadpoint was the sole employer of the unit of employees, thereby finding that BFI did not qualify as their joint employer under a narrow and clipped understanding of joint-employment doctrine. The Union appealed, on the basis that the Regional Director did not fully apprehend or give suitable consideration to the body of evidence put before him which, if properly credited, would necessitate a finding of joint employment by the Respondents. Alternatively, if the Regional Director's Decision is to be endorsed under the facts presented, then the standard applied to the evidence is at fault for a conclusion that contradicts the express language of the Act and the purposes for which it was drafted.

Below, we describe BFI's Milpitas operations and, importantly, its authority over them. BFI's authority over its business permeates its operations and extends to those who perform the requisite labor, be they BFI or Leadpoint employees. While BFI directly employs certain employees, it has contracted with Leadpoint to provide the majority of the employees that perform the essential work of its business, namely, sorting through the waste, trash and mixed materials retrieved for reclamation or disposal. As detailed below, BFI owns and controls all aspects of the physical environment in which the unit employees work, it owns the land, the facility and the machinery, and directs how the machinery is operated, who may work on its premises, and the "quantity" and "distribution" of labor necessary to its business.

BFI also controls Leadpoint, and not merely through contractual reservations of authority. Indeed, the Recylcery is a panopticon with BFI at its center: BFI controls the day-to-day work of the unit employees, through constant monitoring, supervision and communication to

Leadpoint's supervisors. This authority extends to Leadpoint as well. In reaching its arrangement with BFI, Leadpoint has contracted away its authority over various terms and conditions of its employees' employment. As a result of its labor-only, cost-plus contract with BFI, Leadpoint has no meaningful ability to negotiate the wages of its employees that are set by virtue of its contract with BFI. The unit employees work nowhere else than at the Recyclery, they are hired for the positions, and fired or laid off when BFI no longer needs them. Despite this, the Regional Director found no joint employment relationship between these two entities, primarily on the basis that Leadpoint also employs supervisors (who themselves are at BFI's beck-and-call).

Petitioner contends the Regional Director erred in his conclusions of law and fact, and took an improperly narrow view of the pertinent facts imparting joint employment status under the Board's current standard.

Below we also describe the Board's current joint employment standard, and how it too easily permits the calculated restructuring of employment, and the subcontracting of the indicia of an employment relationship - but nothing else - to an intermediary, while experiencing none of the inconvenience of relinquishing the privileges and obligations parcel to the employer-employee relationship.

As the Supreme Court has affirmed, the Board must determine whether an entity exercises sufficient control over terms and conditions of employment to be an employer. *Boire v. Greyhound Corp.*, 376 U.S. 473, 84 S.Ct. 894 (1964). "Sufficient" control must be understood in the context of effectuating the fundamental purpose of the Act and be guided by the "industrial realities" of the workplace. The Board's current joint employer formulation is the result of an *ad hoc* approach that pays no fealty to the terms of the Act, as it focuses exclusively on a concern with "direct control" over the employees' person, ignoring the relationship between the entities themselves and indirect control over employees' terms and conditions of employment. This standard ignores indicia of control exhibited between the entities themselves, whether direct or

indirect. As detailed below, this formulation is contrary to the terms of the Act, and we urge the Board to adopt a meaningful standard that is loyal to the statue.

The approach Petitioner proposes ensures that employees are not prevented "from bargaining with the company that, as a practical matter, determines the terms and conditions of their employment." *In re Airborne Freight Co.*, 338 NLRB 597 (2002) (Liebman, concurring).

II. STATEMENT OF FACTS

A. BFI's Integrated Recyclery Operation

BFI operates a Recyclery or Material Recovery Facility ("MRF") in Milpitas, California. (Tr. 13:4-9.)[2] BFI receives approximately 1200 tons a day of mixed materials, waste and recyclables that are sorted into commodities and sold. (Tr. 13:4-9.) BFI solely employs approximately 60 employees who work at the Recyclery who receive and transport these commodities in the facility, in various positions including loader operators, equipment operators, forklift operators, sort line equipment operators, spotters and mechanics. (Tr. 14:14-20; 32:21-22.) BFI also directly employs one sorter. (*Id.*) These employees are not the subject of the Union's petition.

BFI owns and operates large machinery used in the sorting process, comprising a series of four conveyors, screens and motors. (Tr. 15:20-23.) BFI has built platforms around the conveyors (or lines) with stations for sorters to stand as they manually sort passing materials. (Tr. 15:23-16:3; 187:1-5.)

BFI has contracted with Leadpoint to provide employees to perform its sorting work. (Tr. 16:23-17:1.) BFI has also contracted with Leadpoint to provide employees to perform attendant work, including screen cleaning, maintenance help, and housekeeping. (Tr. 185:24-186:5.) Leadpoint employs approximately 240 full time, part time and casual employees that

[2] BFI is a subsidiary of Republic Services. BFI is referred to by employees generally and in the record as Republic Services. (Tr. 43:5-19.)

work at the BFI facility, the vast majority of which are employed as sorters. (Tr. 185:12-17; 187:24-25.) These employees are the subject of the instant petition.

Through a variety of processes and personnel, BFI manages the work performed by the sorters. Leadpoint cannot change the number of employees that work on each line; these parameters are set by BFI. (Tr. 36:1-19.) BFI controls the speed and operation of the belts that carry the unsorted materials past the sorters for sorting (Tr. 42:3-5, 85:22-86:2) and requires sorters to be at each BFI-determined work station while the belt is moving. (Tr. 187:1-4.) "Each station has a different set of responsibilities." (Tr. 155:8-9.) Leadpoint cannot change the workstations or the number of workers manning each station, all of which are within the control and direction of BFI. (Tr. 186:24-187:7; 165:1-6; 178:14-179:10.)

The testimony of Leadpoint's CEO's is illustrative of the arrangement:

> there's stations on the machine where a sorter is -- that's their workstation. That those stations have to be manned or that a sorter must be in those stations to collect the material. And I would suspect that that requirement comes from the equipment manufacturer and within collaboration with our customer, BFI.

(Tr. 187:2-7.) In other words, BFI dictates whether a particular workstation will be manned and Leadpoint is not involved in that process, but receives direction by BFI and can only surmise a basis for BFI's staffing decisions. Leadpoint provides the labor to meet BFI's daily headcount, and that is all. (Tr. 165:1-6.) Leadpoint has no authority or ability to, for example, ensure BFI complies with manufacturer specifications for the operation of heavy equipment, nor could it provide to a collective bargaining representative any information about safety standards or manufacturing specifications for the heavy machinery on which the unit employees work.

BFI retains ownership over all of the commodities that the unit employees sort and that BFI resells. The efficient running of the sorting operation is integral to BFI's business. BFI employs an operations manager at the Recyclery, Paul Keck, and a shift supervisor for the day shift (John Sutter) and a shift supervisor for the swing shift (Augustine Ortiz). (Tr. 17:13-23.) BFI's three supervisors are charged with ensuring that BFI's sorting operation runs efficiently

and productively. (Tr. 81:23-25.) In that regard, they "oversee what needs to be done" on the sorting lines each shift and, to that end, direct Leadpoint's supervisors as to the work, and also conduct twice-daily pre-shift meetings with Leadpoint supervisors for that purpose. (Tr. 90:9-12 (BFI supervisor describing that he sets up a "plan" for each shift for the unit employees' work); 75:6-10.)[3]

The unit employees are folded into BFI's operation and work in concert with BFI employees, and within BFI's integrated operation. BFI directly employs one sorter who works alongside the unit sorters. (Tr. 14:17; 31:5-6; 153:13-19 (the BFI-employed sorter works on the container line and the other nine positions on that line are filled by unit employees).) The job duties of the BFI-employed sorter are the same as the unit sorters. (Tr. 155:4-9.) If the BFI-employed sorter is not at work on a particular day, a unit employee performs her duties. (Tr. 155:10-12.)[4] Importantly, BFI's line operators operate the sorting lines on which the unit employees work. (Tr. 31:10-17.) The BFI line operators cannot perform their job duties without the unit employees working on the line and vice versa. The Leadpoint-supplied maintenance helpers work alongside the BFI mechanics. Importantly, the BFI mechanics direct and assign the unit maintenance helpers work throughout their workday. (Tr. 241:13-20; 242:11-13.) In recognition of the interrelated nature of the unit employees to BFI's operations and to BFI employees, Operations Manager Keck explained that Leadpoint had no authority to change shift times and could not do so because it would require changing BFI's shift times. (Tr. 148:6-11.)

[3] The Regional Director's Decision describes Ortiz and Sutter as supervisors of BFI employees (Decision, p. 5) but omits a description of their duties to oversee the sorting lines and coordinate with the Leadpoint supervisors to provide a plan each shift for the unit employees' work.

[4] The Regional Director's Decision mentioned that the BFI-employed sorter works alongside the unit employees but did not consider this fact as evidence of BFI's control over the sorting operation. That the unit employees perform in the same manner as the BFI-sorter supports an inference that BFI controls the manner in which the unit employees work. Further, the interchange between the BFI and unit employees is probative of BFI's control over its sorting operations and the unit employees' work.

B. BFI's Contract with Leadpoint

BFI and Leadpoint have entered into a written agreement for these labor services. (Jt. Exh. 1.) Pursuant to the written agreement, BFI reserves to itself the authority to set the qualifications for unit employees. (Jt. Exh. 1, p. 2.) BFI requires unit employees to pass a five panel urinalysis drug test within 30 days prior to beginning work at BFI. (Jt. Exh. 1, p. 2; Tr. 45:12-46:4.)[5] BFI requires the unit employees to sign a written acknowledgment that they understand they are obligated to work free from the effects of drug and alcohol. (Jt. Exh. 1, p. 2.)

BFI requires unit personnel to comply with its safety policies (Jt. Exh. 2, p. 3), and reserves the right to enforce its safety policies as to unit employees. (Jt. Exh. 1, p 4.) BFI also reserves the right to designate whether unit employees are working in "safety sensitive" positions and to require such unit employees to execute an acknowledgment form that they have read, understood and agree to comply with BFI's safety policy. (Jt. Exh. 1, p. 3.) BFI Division Manager Carl Mennie affirmed, "I am sure that the agreement says that we can enforce or we can have a safety policy onsite and require Leadpoint to live up to it." (Tr. 47:23-48:10.) BFI requires unit employees to wear only the types of personal protective equipment delineated in the agreement. (Jt. Exh. 1, p. 4.) BFI requires unit employees to immediately report any accidents to BFI management. (Jt. Exh. 1, p. 4.)

BFI requires unit employees to obtain from BFI management approval of the accuracy of their hours worked prior to payment. (Jt. Exh. 1, p. 4.) BFI reserves the right to inspect the unit employees' personnel records (which, under California law, are private records. *San Diego*

[5] The Regional Director's Decision dismisses this as evidence of BFI's authority over terms and conditions of employment as follows: "While the Agreement mandates these tests in general, the manner in which they are administered, and the provider chosen to administer the testing, is decided solely by Leadpoint." (Decision, p. 7.) BFI does, in fact, dictate aspects of administration by requiring that the drug screen be within 30 days, by urinalysis and that it be at least a "five-panel." In contravention of the joint employer standard, the Regional Director appears to require BFI to exclusively determine a term or condition of employment, as opposed to considering BFI's role in co-determining such a term. This is contrary to the plain language of the joint employer standard, common law principles from which the standard derives, and the Act. Moreover, BFI retains complete control over the hiring qualifications for unit employees and, therefore, could decide to mandate that Leadpoint use a specific provider. (Jt. Exh. 1, p. 2.)

Trolley, Inc. v. Superior Court, 87 Cal.App.4th 1083, 1097 (2001). (Jt. Exh.1, p. 7; Tr. 48:19-21.)

BFI reserves to itself the right to "reject any personnel" and to "discontinue the use of any personnel for any or no reason," which it has exercised on three occasions. (Jt. Exh. 1, p. 4; Tr. 47:4-13; Tr. 182:9-22.)

BFI restricts the maximum wages that Leadpoint can pay to its employees. (Jt. Exh. 1, p. 1 ("[Leadpoint] shall not, without [BFI]'s prior approval, pay a pay rate in excess of the pay rate for full-time employees of [BFI] who perform similar tasks."); Tr. 179:11-17.)[6] It also requires unit employees "not to commit any act or make any statement, oral or written, that would injure [BFI]'s business, interests or reputation" (Jt. Exh. 1, p. 6) and requires unit employees to keep confidential information related to BFI's "products or services, ... business affairs, pricing, suppliers, customers, routes and distributors ... facility lay-out and equipment." (*Id.*)[7] In addition to the vast control over the unit employees' terms and conditions of employment that Leadpoint has assigned to BFI, BFI regularly exercises control over the unit employees, as will be described in more detail below.

BFI and Leadpoint have a cost-plus contract. Leadpoint only provides labor to BFI and BFI pays Leadpoint an agreed-upon hourly rate for each man-hour worked by a unit employee multiplied by a percentage mark up, and thus, BFI is the ultimate source of any wage increases to

[6] The Regional Director found insufficient evidence that BFI controls or co-determines unit employees' wages despite the express ceiling on unit employees' wage rates. (Decision, p. 15 (noting that "nothing in the Agreement would forbid Leadpoint from ... lowering its employees' wages".) The Regional Director does not cite to any authority that this limitation is insufficient and Petitioner submits that this is sufficient to establish that BFI co-determines unit employees' wages. BFI's control constricts any bargaining that the employees' may engage in with Leadpoint over wages.

[7] While the Regional Director specifically rejected consideration of certain authority reserved to BFI by contract that implicates unit employees' terms and conditions of employment, the Regional Director also failed to consider several aspects of the Agreement, including BFI's control over hiring qualifications for unit work, the authority to set and enforce safety rules, and the restriction on unit employees' speech.

unit employees. (See Exh. A to Jt. Exh. 1.) The agreement between BFI and Leadpoint may be cancelled upon 30-days notice. (Jt. Exh. 1, p.1.)[8]

The one instance in which Leadpoint increased the wages of the unit employees (to comply with the applicable minimum wage), it renegotiated the terms of the agreement with BFI to raise the base wage rate to coincide with the minimum wage increase. (See Union Exh. 3.) This illustrates a salient fact: Leadpoint was unable to implement a wage increase to comply with minimum wage law without renegotiating the terms of the agreement with BFI.[9] Moreover, BFI exercises control over the wage rates through its review of Leadpoint's pay to each employee. For example, BFI affected the wage decrease of unit employee Clarence Harlin, when Keck pointed out that he was being paid differential pay that Keck did not believe he was entitled to based on his work assignment and caused Leadpoint to reduce his wage rate. (Tr. 293:7-11; 295:16-20.)[10]

C. BFI's Control Over the Hours Worked by Unit Employees

1. BFI Controls the Number of Unit Employees Working at Any Given Time

Each day, BFI provides Leadpoint the target headcount (or number of employees) for the day. (Tr. 36:4-12; 105:17-21.) Leadpoint complies with the target headcount; it does not supply more employees. (Tr. 36:13-19; 165:1-6.) BFI pays Leadpoint based on the number of hours that the unit employees work. (Tr. 39:21-40:7.) BFI receives a daily report organized by employee

[8] The Regional Director's Decision does not consider the power and influence that BFI wields over the unit employees' wages by the cost-plus structure of the agreement itself. Practically, as some court and Board decisions have recognized, BFI's approval is necessary for any unit employee wage increase.

[9] The Decision does not consider this fact.

[10] The Regional Director found that BFI's action did not evidence control over the unit employees' terms and conditions of employment because "it is apparent that Keck simply informed Leadpoint of this incorrect differential pay because BFI was being billed the incorrect amount." (Decision, p. 6.) It is undisputed that BFI's review of Harlin's wage rate, intervention and refusal to pay Leadpoint at the higher wage rate, caused Harlin's decrease in wages. BFI has the authority to and does review the wages paid to the unit employees and controls those wages through the cost-plus agreement structure with Leadpoint. If Leadpoint wanted to raise any unit employees' wages, ultimately, it would need BFI's agreement to raise its reimbursement rate, as occurred when the minimum wage applicable to these employees increased. (See Union Exh. 3.)

listing the hours worked, overtime and bill rate. (Tr. 55:8-10; 147:23-25.) BFI manager Keck reviews this information to ensure that it is in line with BFI's expectations and target headcount. (Tr. 147:13-148:5.)

On any given work day, BFI determines the sorting lines that will be running. (Tr. 36:1-3.) BFI controls and determines the number of people working on any particular line. (Tr. 36:1-19.) For example, three days before the hearing on Friday, August 2, 2013, BFI, through its Manager Paul Keck, instructed Leadpoint to reduce by two per shift, the number of employees on a particular line. (Union Exh. 1; Tr. 54:5-11.) BFI then instructed Leadpoint as to the positions of the remaining people on that particular line and their duties. (Union Exh. 1; Tr. 54:12-15.) BFI set the effective date for the change. (Union Exh. 1; Tr. 149:8-10.) The email directive mandating this change in operations is demonstrative of the absolute control BFI exercises over the work assignments and the specificity provided on where and how to perform the unit work:

> Please reduce the CDR presort line by 2 employees on each shift = total reduction of 4, leaving staff at 163. Two of your employees should be positioned at the east end of the presorts focusing on glass. Their secondary picks should be plastics into the Recycling Stream drop chute. The remaining two should be positions accordingly:
> - One between residue and metal, focusing on items potentially damaging to downstream equipment or that pose downtime issues (wrap). Residue to drop chute, large metal "picked" to reduce "swipe" contamination. Great spot for a right hander. 30 gallon garbage can needed to collect plastic and glass bottles and cans.
> - One between wood and metal, focusing on items potentially damaging to downstream equipment, or that pose downtime issues (wrap). Large metal "picked" to reduce "swipe" contamination, wood picked to wood drop. Great spot for a right hander. 30 gallon garbage can needed to collect plastic and glass bottles and cans. If there are "lefties" on the lines, one might consider placing them where they can be left hand dominant.
>
> **This staffing change is effective Monday, August 5, 2013.**

(Union Exh. 1.) (emphasis in original.) BFI's directive ordering a staffing change is unequivocal. BFI and only BFI, has the authority to implement such changes.[11]

[11] Despite this evidence and admissions from both BFI and Leadpoint that BFI controls the staffing levels and the corroborating documentary evidence, the Regional Director made the finding wholly unsupported

While Leadpoint may determine which employees work subject to BFI's demands, the agreement reserves to BFI the right to control the individual who performs the work. Indeed, Leadpoint's authority with respect to staffing is limited to determining the identity of the employees hired and assigned to positions defined by BFI, subject to BFI's reserved right of approval and determination of qualifications.[12] In sum, BFI exercises exclusive control over the number of unit employees employed per shift and their line assignments.

2. BFI Determines the Hours Worked Each Day by Unit Employees

BFI sets the shifts that the unit employees work. (Tr. 39:18-20.) BFI's current schedule for the unit employees, as determined by Keck, is day shift: 4am - 12:30pm for two lines and 4am-1:00pm for two lines; swing shift starts at 2pm. (Tr. 140:19-141:2.) Leadpoint has no authority to change the shift times. (Tr. 148:6-11.) BFI operations manager Keck explained:

> Q. Does Leadpoint have any authority to change the shift times that you described earlier?
>
> . . .
>
> A. No. They could certainly ask us, I suppose, if they felt that it would be more conducive to something, but there are Republic Services employees that adhere to it. You know, there is a schedule for all the employees for Republic. *So a shift like that would dictate a shift in Republic staffing schedule changes as well.*

(Tr. 148:6-16.) (emphasis added) Leadpoint does not have the authority to change shifts and cannot have that authority because it would impact BFI employees' shifts. This testimony

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by the record that Leadpoint decides the number of unit employees that work each day. (Decision, pp. 11, 17.) Further, the Regional Director found that "BFI does not instruct Leadpoint how to staff the lines." (Decision, p. 10.) The Regional Director appears not to have considered the fact that dictating the total number of employees, their exact positions on the line, and what should be done at each position, constituted "how" to staff the lines, but instead interpreted "how" to staff the lines as limited to the identity of the employees - the only decision that Leadpoint controls. The Regional Director's findings are contradicted by both fact and law.

[12] The Regional Director's Decision emphasized Leadpoint's control over the hiring decision. That hiring decisions are not a mandatory subject of bargaining is illustrative of how far the joint employer standard is divorced from the purpose of the Act.

illustrates that BFI co-determines the unit employees' terms of employment, and that BFI and Leadpoint employees work interdependently to further BFI's core operation.[13]

BFI determines the holidays that the facility is closed and Leadpoint does not have the authority to shut down the facility for different holidays, or remain open when BFI shuts down the facility. (Tr. 51:18-25; 179:4-10.)

BFI employees operate the conveyer belts or lines on which the unit employees work. (Tr. 31:10-17.) BFI, and solely BFI, controls when the line starts and when the line stops. The BFI shift supervisor and the BFI line operator collaborate to determine when to stop the line for breaks. (Tr. 41:17-18; 87:3-7.) For example, BFI shift supervisors will decide whether or not to call a break if the machinery breaks down. (Tr. 89:2-3; 108:23-25.)[14]

BFI also controls when the lines start running and, therefore, dictates whether the unit employees have sufficient time to stretch, presenting a possible health and safety issue. (Tr. 206:14-16 (Leadpoint supervisor noting that sometimes stretching gets cut short because BFI starts the lines); 281:17-21.)[15]

BFI controls whether unit employees will work overtime by deciding if and when lines continue running past the shift time. (Tr. 37:5-7; 38:9-12; 87:8-23; 107:19-108:3; 141:3-11; 274:21-275:20 (explaining that sometimes the workers are not even told that they are working overtime, but the lines keep running so they must keep working overtime).)[16]

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[13] The Regional Director's Decision notes that BFI controls shift times but fails to consider this as evidence of control because Leadpoint determines the identity of the employees who work on each shift. At a minimum BFI co-determines the hours worked by mandating the shift times and overtime.

[14] The Regional Director's Decision fails to consider the undisputed fact that Leadpoint has no authority over this term and condition of employment and cannot bargain over breaks.

[15] The Regional Director's Decision failed to consider this fact.

[16] The Regional Director did not consider BFI's control over whether and when overtime is worked because Leadpoint can exercise control over the identity of the unit employees who work overtime. Again, BFI's exclusive control over whether and for how long unit employees work overtime co-determines that term and condition of employment. The fact that Leadpoint can select the identity of the employees who work overtime does not diminish BFI's control over unit employees' overtime. Moreover, there is no evidence in the record that BFI cannot select the identity of the unit employees' to work overtime, nor is there clear evidence that Leadpoint actually exercises with any regularity any authority to

D. BFI Controls the Unit Employees' Day-to-Day Work

1. BFI's Control Over the Sorters' Work

The sorters' work is dictated by the lines, which are solely controlled by BFI. BFI designates the number of employees working on each line, where they work along the line and, in turn, what work that they perform. BFI determines when the lines run and when they stop.

Further, BFI controls the speed at which the line runs throughout the shift and, therefore, the speed at which the sorters work. (Tr. 40:14-21; 100:23-24; 108:13-22.) The BFI shift supervisor and the BFI line operator collaborate to determine the belt speed. (Tr. 41:10-16.) BFI runs the lines at the speed it believes is optimal to sort most efficiently. (Tr. 110:8-111:4.)[17]

Prior to each shift, the BFI supervisors meet with the Leadpoint supervisors to discuss the work for that day. (Tr. 40:8-13; 75:6-10; 107:10-16.) In the words of the BFI day shift supervisor, he "dictate[s] what lines are going to be run" and discusses and "coordinate[s] what's going to be executed throughout the day." (Tr. 75:6-10.) The BFI shift supervisors "oversee what needs to be done" on the lines, so they set forth the "plan" for the day. (Tr. 90:9-12.) In other words, BFI directs the work that will be performed by the unit employees each day.

2. BFI Sets Productivity Standards for the Unit Employees

BFI maintains productivity standards for the unit employees related to the tons of refuse processed per hour on, and the downtime of, the sorting lines. (Tr. 41:19-25.) Those productivity standards are set by the BFI shift supervisor and BFI line operator, who are tasked with ensuring

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select employees to work overtime (as opposed to the practice that the employees assigned to the particular lines that BFI runs overtime are those who work overtime).

[17] The Regional Director concluded that BFI does not control "the speed in which the Leadpoint employees work[.]" (Decision, p. 17.) This finding is not supported by the record evidence. The Regional Director found that BFI controls the material on the conveyer belt, which the sorters are employed to sort, and how fast the material proceeds along the line. The Regional Director reasons, however, that the employees working on that line still have control over the speed in which they work (presumably meaning they can ignore the materials as they proceed past them) and therefore BFI exerts no control over their working conditions. This reasoning misapprehends the standard of control and the realities of the workplace. Certainly, BFI's control over when and how fast the lines are running dictates the employees' working conditions and influences the rate at which employees work.

the productivity of the lines. (42:11-16; 81:23-25.)[18] BFI supervisors monitor the compliance with those standards and intervene to improve unit employee performance in various ways. BFI adjusts the speed or makes other adjustments to the running of the line, such as adjusting a screen, or telling workers to pick more, based on the performance of the workers. (Tr. 111:6-21.) For example, at times the BFI supervisors will come to the lines directly to urge unit employees to work faster or minimize stops, or to give instructions regarding what materials to remove. (Tr. 222:2-6; 282:6-19; 259:10-15; 244:22-245:10.)

3. BFI Trains Unit Employees

BFI expanded its facility, and reopened approximately one year prior to hearing. BFI supervisor John Sutter testified that at that time, BFI trained everyone, including Leadpoint employees as to how to perform their job, including what to pull off the belt, and how to fix a jam. (Tr. 102:6-103:1.)

> Q. Now, you mentioned that when you first started up, no one knew anything, so you had to do some training. What time period are you talking about there?
> A. Oh, I'd say the first month.
> Q. The first month with the Leadpoint employees?
> A. The first month with everybody.
> Q. Okay. And that included the Leadpoint employees? Yes?
> A. Yeah.
> Q. Okay.
> A. Yes.
> Q. And what kind of training was given to the Leadpoint employees during that first month?
> A. What to pull off the belt. If there's a jam, how to get a rotor out of a screen.
> Q. And who specifically gave that training about the pulling -- what to pull off the belt, and how to deal with a jam?
> A. Well, the leads would direct the workers, and they got their information -- the leads got their information from management.
> Q. Including yourself?
> A. Including myself.

[18] The Regional Director's Decision did note that BFI maintains productivity standards for the unit employees (Decision, p. 9) but did not consider this fact in the analysis.

(Tr. 102:6-103:1.) The testimony of the BFI supervisor reveals that BFI directs *how* the unit work is performed.[19]

BFI's control over how work is to be performed does not end with this initial training; it continues on a daily basis. Sutter confirmed that BFI trains Leadpoint supervisors on how to deal with various issues as they arise. (Tr. 115:4-22; 116:5-11.) For example, BFI had its mechanics train Leadpoint supervisors and unit employees on how to clear jams. (Tr. 115:24-116:4.) Because of this training, BFI can now typically point out problems to Leadpoint supervisors to handle in conformance with BFI's specifications and previous instruction.

4. BFI Monitors Unit Employee Work

BFI's line operator monitors the line and unit employees throughout their shift. The BFI supervisors are in constant contact with the BFI line operator and the Leadpoint supervisors. BFI has provided walkie-talkies to the Leadpoint supervisors for this purpose. (Tr. 39:12-17; 104:8-13; 104:17-19.) BFI's swing shift supervisor estimates that he spends 40% of his shift directly speaking to Leadpoint supervisors. (Tr. 74:20-22.)[20]

In addition to this indirect supervision, both the day and swing shift BFI supervisors spend a significant amount of their work day personally and directly observing the work of the unit employees. (Tr. 75:20-22 (Ortiz, the swing shift supervisor, is in the unit work area everyday throughout the day); 82:23-25; 270:2-4; 114:22-115:3 (Sutter, the day shift supervisor, spent 25-30% of his time with unit employees before recently taking over the responsibilities in of overseeing the shipping department.) Further, the Operations Manager spends 30% of his work time in areas with unit employees. (Tr. 127:16-22.)

[19] The Regional Director's Decision states that the only time BFI trained rank and file employees was for one month in 2009. The one month of training actually occurred approximately one year prior to the hearing when BFI reopened its facility with newer, larger sorting equipment. (Tr. 120:11-121:10.) Moreover, BFI holds meetings with unit employees to direct quality and safety issues and intervenes directly when they observe an issue.

[20] The Regional Director's Decision did not consider this constant communication throughout the shift between BFI supervisors and Leadpoint supervisors, nor that BFI provides walkie-talkies to Leadpoint supervisors for this purpose.

The purpose of this continuous observation is to ensure that unit employees are performing the work in compliance with BFI's directives and to take corrective action as necessary. (Tr. 75:20-1; 98:20-22; 128:9-16.)

5. BFI Intervenes to Correct and Continue to Train Unit Employees

BFI intervenes when it observes issues of productivity or quality. (Tr. 75:20-1; 98:20-22; 128:9-16.)[21] When BFI managers or supervisors observe a quality issue they either bring it to the Leadpoint supervisor's attention or directly intervene. (Tr. 111:16-21 (Sutter admitting that he may adjust speeds, adjust screens or tell employees to pick up the pace to deal with productivity issues); Union Exh. 1 (BFI manager moved two positions off the line to increase efficiency); Tr. 99:1-10 (Sutter, the day shift supervisor, raises a problem with a line (such as there is too much plastic) and expects the Leadpoint supervisors to handle it, as they know how to do); Tr. 147:4-12 (Keck held meetings with the wet line regarding their job based on observations of the quality of the work); Tr. 296:10-297:5 (Keck instructed employees to clean their areas before going on break directly because when he tried giving the instruction through the Leadpoint leads it was not successful). BFI supervisor Ortiz likewise intervenes when he observes quality issues or to motivate unit employees to perform better, and sometimes will instruct the Leadpoint supervisor to deal with similar issues. (Tr. 84:6-1; 75:22-76:3; 82:8-22; 98:20-99:5.) Indeed, at times the BFI supervisors will come to the lines directly to urge unit employees to work faster or minimize stops, or to give instructions regarding what materials to remove. (Tr. 222:2-6; 282:6-19; 259:10-15; 244:22-245:10.)

BFI supervisors have conducted meetings with unit employees to discuss quality issues on certain lines. (Tr. 83:3-6; 83:19-21; 84:24-85:1; 112:17-24; 136:17-19.) For their part, BFI managers Keck and Ortiz held a meeting the week before the hearing, instructing and reminding swing shift employees as to what product needs to be sorted from the line, and which items should be given higher priority. (Tr. 246:17-23; 259:24-260:5.) Keck held several meetings with

[21] The Regional Director's Decision did not address this evidence of BFI's corrective intervention.

the unit employees who work on the wet line and commercial single stream line, and instructed them as to how to remove plastic and what techniques to use in doing so. (Tr. 113:10-12; Tr. 146:16-19.) Keck explained the difference between organic and inorganic items to teach them what items should be removed, or in other words, how to do their job. (Tr. 145:16-24.) Keck was prompted to hold these meetings based on his observations about the unit employees' work. (Tr. 147:4-12.)

On another occasion, approximately two weeks before the hearing, BFI supervisor Ortiz took the swing shift employees around the plant instructing them as to how to do their job and specifically the difference between good output and bad output. (Tr. 247:12-248:6; Tr. 272:7-19.) These directions were enforced through Leadpoint supervisors, under threat of discipline. (Tr. 259:3-8.) In another example, Sutter called a group of unit employees to the control room to discuss rejections and told them to work more efficiently and work harder. (Tr. 222:14-223:10.)[22]

6. BFI Changes the Assignments and Duties of Unit Employees

It is undisputed that BFI dictates the positions to be filled by Leadpoint employees. (*See, e.g.*, Union Exh. 1 (eliminating two positions from a line).) In addition, BFI has directed changes to positions of specific unit employees. BFI supervisors sometimes direct specific sorters to move from one line to another and perform different job duties. (Tr. 210:23-211:8.) One Leadpoint supervisor testified that BFI may direct Leadpoint supervisors to move a sorter from

[22] The Regional Director apparently credited the initial testimony of Keck, Ortiz and Sutter that they do not give instructions to unit employees though this testimony was later contradicted by their own admissions. (Decision, p. 9). The record evidence shows BFI manager meetings and directions to unit employees regarding how to perform and how to improve productivity to meet BFI's standards. (See, e.g., Tr. 146:16-147:3; 145:16-24; 112:17-113:1; 83:3-6; 83:19-21; 84:24-85:1; 224:22-245:10; 245:15-21; 246:4-12; 258:12-17; 259:10-23; 272:7-19; 282:20-25; 283:10-284:4.) The Regional Director also rejected the fact that BFI gives instruction through Leadpoint supervisors as evidence establishing BFI control over the unit employees, apparently because it was "indirect." Petitioner contends that an employer cannot render a specific directive "indirect" by relaying it through an intermediary. Moreover, as explained in subsection III.B, any requirement that control be "direct" is contrary to the joint employer standard and the Act.

one line to another. (Tr. 211:1-8; 211:15-18 (explaining that the BFI control room operator may advise a sorter to move to a different line).)[23]

Marivel Mendoza gave unrebutted testimony that John Sutter has directed her on at least two occasions to actually switch to a different line based on her skill. (Tr. 282:20-25; 283:13-15.) Mendoza has followed those directions. (Tr. 283:10-12.) Similarly, David Martinez who operates the belts from the control room has moved Mendoza to different locations. (Tr. 283:16-284:1.)[24]

7. BFI Controls the Non-Sorter Unit Employees

BFI mechanics work alongside the unit employees who provide assistance to them. (Tr. 32:21-34:16; 243:18-20.)[25] BFI, and only BFI, directs the work throughout the day of the unit employees working as maintenance helpers. Travis Stevens gave unrebutted testimony that he worked as a maintenance helper, approximately two or three weeks prior to hearing, and when he worked in that position he only received directions from BFI personnel. (Tr. 241:13-20.) While working as a maintenance helper he was instructed as to what to do by BFI mechanic Pablo or BFI shift supervisor Ortiz without using Leadpoint supervisors as go-betweens. (Tr. 241:13-20; 242:11-15.) Stevens gave unrebutted testimony that he was trained as a maintenance helper by BFI. When Stevens was placed in that position he did not know how to repair any machinery and he was shown how to fix the machines by BFI. (Tr. 241:22-242:10.) Stevens worked to repair the machines, as directed by BFI, and in accordance with how BFI

[23] The Regional Director's Decision did not consider this evidence.

[24] The Regional Director found that "BFI has no authority over the particular employees who work on the material streams or the authority to decide where a Leadpoint employee is assigned." (Decision, p. 9.) Not one witness testified that BFI "has no authority" over the assignment of unit employees. The Regional Director's Decision is nonsensical given the undisputed fact that BFI has the authority to dismiss any unit employee from their assignment on a materials line and has exercised that authority on three occasions. The Regional Director's finding ignores the uncontroverted evidence of unit employee reassignment by BFI.

[25] The Regional Director's Decision did not consider the evidence of BFI's control over the maintenance helpers, despite the uncontroverted evidence that BFI does not use Leadpoint as an intermediary to direct the work of these employees.

trained him. (Tr. 242:16-18.) If Stevens did not know how to fix a machine, or had a question about how to perform his job, he would go to BFI's personnel. (Tr. 242:19-22.)

BFI regularly gives directions directly to unit employees who do not work as sorters. (Tr. 216:7-20; 217:23-218:11.) Clarence Harlin, who works in housekeeping, estimates that he receives directions from BFI directly at least a couple of times per week. (Tr. 217:23-218:11.) Harlin testified that Keck has instructed him to clean the fence line and this has now become part of his job duties. (Tr. 229:7-13.)

E. BFI Controls Other Terms and Conditions of Employment

1. BFI Exercises its Authority to Set Work Rules for the Unit Employees

Pursuant to the agreement between the parties, BFI requires unit personnel to comply with its safety policies. (Jt. Exh. 2, p. 3.) BFI reserves the right to enforce its safety policies as to unit employees (Jt. Exh. 1, p 4), and BFI management confirmed this reservation of rights. (Tr. 48:2-11.)

These reservations of rights are not hypothetical, rather, they have been exercised. For example, BFI has enforced against unit employees its alcohol-free workplace rule (Union Exh. 2), resulting in dismissal of two unit employees (Tr. 131:13-132:10). Keck admitted his statement implied a demand of discipline. (Tr. 132:9-10; 58:13; Tr. 143:14-144:1 (Keck described his enforcement actions as, "not on my watch.")[26]

In addition to safety rules, BFI has set and enforced work rules related to unit employees' performance. BFI has set an enforced a standard establishing when unit employees can use the emergency stop mechanisms on the line, intended to limit the instances of delay and thereby increase efficiency of the line and BFI's profits. All three BFI managers who interact with unit employees confirmed that they have instructed the Leadpoint lead employees regarding when to

[26] The Regional Director's Decision considers this fact but reasons that BFI merely exercised its right as a property owner, though it is undisputed that BFI is exercising control that meaningfully affects terms and conditions of employment. The "premises liability" exception to the Board's joint employer analysis is discussed below.

pull the emergency stop, so that the leads train and enforce this rule as to the unit employees. (Tr. 41:6-9; 88:2-9; 103:2-13.) BFI monitors how often the emergency stop is being pressed. (Tr. 103:23-104:9.) As with its other standards, if unit employees fail to meet them, BFI supervisors intervene. (Tr. 103:19-22; 222:10; 245:1-21.) Keck held a meeting with employees on the swing shift in which he instructed them as to how many times they hit the button to stop the line, and instructed them to minimize its use. (Tr. 245:15-21; 246:4-12.)[27]

Shortly before the hearing, BFI enacted a new expectation that unit employees clean their work stations, thereby expanding their job duties. (Tr. 112:6-8.) BFI first instructed, through the Leadpoint supervisors, that unit employees clean up their work stations before going on break and after the conveyor belts stop. (Tr. 112:9-12; 273:11-15; 284:17-285:3.) After Keck personally observed that his directive was not being followed by the unit employees, Keck gave these directives directly to unit employees. (Tr. 296:2-7; 296:23-297:5.) Keck explained, "I wanted to make it very clear, this is a cultural change in that -- or condition change. I think the condition was that when they -- the bell rang, everybody just simply abandoned their worksite and headed off to take their break. And we needed to recondition to simply stop, collectively gather up the debris that was on the ground." (Tr. 296:10-15.) Ortiz likewise has instructed unit employees to clean the BFI facility. (Tr. 245:13-15; 257:9-15; 274:6-16.)[28]

[27] The Regional Director's Decision failed to consider the record evidence that BFI has implemented and enforced work rules regarding the stopping of the sorting lines. The Decision rejected consideration of evidence of BFI control over employees' terms and conditions of employment exercised through Leadpoint supervisors. Such an approach is divorced from the industrial reality of BFI's control over its sorting operation and elevates form (the requirement that control be direct that has sprung up in Board decisions without any tether to the Act) over the function of the Act to allow meaningful collective bargaining.

[28] The Regional Director's Decision failed to consider evidence that BFI implements and enforces work rules regarding cleaning work stations before breaks. The implementation of this work rule illustrates the control that BFI exercises over unit employees and the true nature of the relationship between BFI and Leadpoint supervisors: that Leadpoint supervisors are there to carry out BFI's specifications (and if they fail, BFI will intervene).

2. BFI Reserves to Itself the Authority to Dismiss Unit Employees from BFI

Per the agreement between BFI and Leadpoint, BFI reserves to itself the right to "reject any personnel" and to "discontinue the use of any personnel for any or no reason," which it has exercised on three occasions. (Jt. Exh. 1, p. 4; Tr. 47:4-13; Tr. 151:17-25; 182:9-22; Union Exh. 2.)

In June 2013, BFI Manager, Paul Keck informed Leadpoint that he requested the "immediate dismissal" of three unit employees. He stated that he witnessed two unit employees with alcohol on the job site and he saw on camera a third Leadpoint employee punch an exit sign. (Union Exh. 2; Tr. 58:9-25.) On all three occasions, Leadpoint dismissed the employee from work at BFI. (Tr. 170:4-5; 199:14-18.) On every occasion that BFI has requested dismissal from the facility, Leadpoint has complied. (Tr. 151:12-16; Tr. 184:1-4.)[29]

3. BFI Controls the Unit Employees' Worksite

BFI maintains and provides the bathrooms, break room and parking lot at the facility, which is jointly used by the employees employed solely by BFI and the unit employees. (Tr. 52.10-16.) BFI also maintains at least two cameras at the facility on which unit employees may be videotaped. (Tr. 208:8-19.) These cameras are not owned or installed by Leadpoint and the footage is not reviewed by Leadpoint. (Tr. 209:1-5.) These cameras, however, have been used on at least one occasion by BFI for disciplinary purposes, to secure the dismissal of a unit employee from work at the BFI facility. (Union Exh. 2.)[30] As described above, BFI controls the

[29] The Regional Director found that this evidence did not establish BFI's control over unit employees' terms and conditions of employment because BFI's actions "were merely those of an owner exercising their right to protect its own premises." (Decision, pp. 13-14.) As will be discussed in subsection III.B below, Petitioner urges that this analysis imported from the tort liability concept of invitees is inappropriate in evaluating a putative employer's control over long-term employees who perform work integrated into the employer's business. Indeed, this concept has been rejected as a basis of distinguishing control by other courts and commissions who have considered it within the employment context. It is the fact of control that matters, not the reason or motivation behind its exercise.

[30] The Regional Director's Decision failed to consider this evidence of control.

equipment on which unit employees work and exclusively controls the maintenance of that equipment and, thus, only BFI can address any safety concerns relating to its equipment. [31]

III. ARGUMENT

A. Under the Board's Current Joint-Employer Standard, Leadpoint and BFI Jointly Employ the Petitioned-For Unit Employees

1. The Current Joint-Employer Standard

The Supreme Court addressed the Board's "joint employer" test in *Boire v. Greyhound Corp.*, 376 U.S.473, 84 S.Ct. 894 (1964), reversing the Fifth Circuit and remanding for a determination of whether the facilities owner "possessed sufficient indicia of control to be an 'employer'[.]"[32] In attempting to determine whether the "indicia of control" is "sufficient" for a joint employer finding, the Board has articulated the following standard: Two entities are considered joint employers for the purposes of the Act where they "share or codetermine those matters governing the essential terms and conditions of employment." *TLI, Inc. ("TLI")*, 271 NLRB 798 (1984); *Laerco Transp. ("Laerco")*, 269 NLRB 324 (1984). The Board stated that it adopted the standard from the Third Circuit's decision in *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117 (3d Cir. 1982). *See TLI*, 271 NLRB at 798 citing *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1123.

Though purportedly adopting the *Browning-Ferris* standard, the *TLI* Board added an additional requirement: "a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction." *TLI*, 271 NLRB 798 (1984); *Laerco*, 269 NLRB 324 (1984).

By its terms and by design, the Board's joint employer standard casts a wide net to include entities that share *or* co-determine matters governing terms and conditions of

[31] The Regional Director did not consider this evidence though safety concerns regarding the heavy machinery that unit employees work on in the MRF is a mandatory subject of bargaining and likely an important concern to these employees, given the inherent dangers in this work.

[32] On remand the Fifth Circuit found that the facilities owner was a joint employer of the janitors and porters employed by its subcontractor. *NLRB v. Greyhound Corp.*, 368 F.2d 778, 781 (5th Cir. 1966).

employment. Significantly, this definition requires neither exclusive nor direct nor immediate control over terms and conditions of employment. Moreover, this definition does not require that control be exercised over all terms and conditions of employment, as the Board has explicitly held. *Sun-Maid Growers of Cal.*, 239 NLRB 346, 351 (1978) *enforced* 628 F.2d 56 (9th Cir. 1980) (for one employer to share or co-determine conditions of employment with another employer does not require that it "exercise[] the full panoply of power over the [joint employees] ... [s]o long as it possessed 'an area of effective control over labor relations.'")

BFI plainly meets the terms of the joint-employer standard. BFI co-determines essential terms and conditions of the unit employees' employment, including, *inter alia*, qualifications for employment; hours of work; breaks; productivity standards; staffing levels; work rules; how, where and when work is performed; the speed at which the machines operate; the facility; dismissal from the worksite; and wages. In fact, it is nearly impossible to identify a term or condition of employment over which Leadpoint exercises exclusive or independent control.

As will be explained in more detail in subsection III.B, the Petitioner contends that the application of the Board's joint-employer standard has strayed from the plain language of this standard and from the purpose and explicit language of the Act. While general recitations of the joint-employer standard has remained nominally the same, starting with *TLI* and *Laerco,* the Board has inexplicably required that the control exercised must be "direct and immediate" and has failed to consider many important indicia of control. *See, e.g., AM Prop. Holding Corp.*, 350 NLRB 998, 1001 (2007) (finding no joint employment relationship because the supervision by the client was "limited and routine").

The Board has added hurdles to its joint employment standard that do not stem from any analytical efforts, the language of the Act or its purpose. Often the Board has failed to articulate any reason for its stricter application and its deviation from prior precedent. However, even under the Board's current application of the joint-employer standard (with the added hurdles) BFI jointly employs the unit employees.

2. Under The Relevant Facts, BFI Is a Joint Employer

a. BFI's day to day control over the unit employees is "direct and immediate" not "limited and routine"[33]

BFI jointly employs the unit employees by virtue of its minute-by-minute control over the unit employees' work and the control exercised over the manner that work is performed. The full record also establishes BFI's control over other essential terms and conditions of employment including job duties, wages, hours, employee assignments, work rules and dismissal from the worksite.

i. The Cases Relied on by the Regional Director Are Inapposite

The Regional Director relied on several cases finding no joint employer because the putative employer's day-to-day supervision of the employees was merely "limited and routine." A brief survey of the cases cited in the Regional Director's Decision, at pages 12-18, demonstrates crucial differences in the level of control compared to the facts present here. In *TLI*, 217 NLRB 798 (1984), the employee drivers worked away from the immediate supervision of the user employer and the instructions that the drivers received were limited to where to deliver. In *Laerco*, 269 NLRB 325 (1984), the direction of unit employees was limited to informing drivers where to deliver and initially explaining to warehousemen where to place unloaded merchandise and only occasionally directing them to unload a particular load. In *Island Creek Coal Co.*, 279 NLRB 858, 864 (1986), the putative employer told employees "what areas to be seeded and the work was then left to the employees to perform." In *Teamsters Local 776*, 313 NLRB 1148 (1994), the putative employer simply designated the loads to be delivered. In these cases the limited and routine nature of the control was also coupled with a lack of control over other terms and conditions of employment.

[33] The Board's current standard (in some iterations) requires that control be "direct and immediate" to be considered in the joint employer analysis. *See In re Airborne Freight Co.*, 338 NLRB 597 (2002). As will be explained in more detail below, the Petitioner urges that this purported requirement be eliminated because it is contrary to the language and purpose of the Act, the joint employer standard itself, the common law of agency from which the standard derives, and has been adopted in Board cases without clear reasoning.

Absent from the record in these cases relied upon by the Regional Director was any showing of the constant control over the employees' day-to-day work that is akin to the control and authority exercised by BFI over the unit employees. In the cited cases, the putative employers gave initial instructions and then left the employees alone to complete the work without consistent observation or exertion of control over how the work was completed, the techniques used, the pace of the work, or whether the employee ever took a break. The Regional Director cited to no analogous case where the unit employees work in the putative employer's facility, on the putative employer's machines that are exclusively controlled and operated by the putative employer. Moreover, the labor-only arrangement between BFI and Leadpoint necessarily requires constant and pervasive control on the part of BFI, in order for BFI to function as a business entity.

ii. BFI's Day-to-Day Control Over Unit Work Is Constant; It Is Not "Limited"

In contrast to the "limited and routine" control exercised in *TLI, Laerco, Island Creek,* and *Teamsters Local 776,* BFI exercises pervasive, near constant control over the unit employees. In contrast to those cases, here there is regular oversight of the unit employees by three BFI supervisors every day throughout the shift. When the BFI supervisors are not directly observing bargaining unit work, they are in walkie-talkie communication with the BFI line operator and the Leadpoint supervisors. Thus, BFI management is overseeing and monitoring the bargaining unit work (directly or through its agents) every minute of every shift.

More compellingly, however, is that BFI exerts constant control over the unit employees' work. BFI's core business is sorting and repackaging this material and it exerts near total control over the employees' work to ensure that they meet BFI's efficiency goals. The unit employees report to work every day at the BFI facility and perform their work exactly as to BFI's specifications, in exactly the same manner as the sorters employed directly by BFI. BFI owns and operates the sorting lines on which the petitioned-for unit employees work. BFI dictates the number of unit employees working at any given minute and exactly where unit employees stand

along the sorting lines and what is done at each position. BFI controls when the lines start and stop throughout the day and at the end of the workday. BFI controls the rate at which the employees work by controlling the speed of the line and the number of employees on each line. BFI has not relinquished control over its sorting operation; instead, it demands compliance with detailed specifications, including the number of employees on each line, where they stand, what they pick, and at what rate they sort.

In contrast to the cases cited by the Regional Director, the unit employees are not left to finish the sorting tasks on their own. In fact, the petitioned-for unit of employees cannot perform their job duties without BFI's direct involvement. Unlike the cases on which the Regional Director's Decision relies, BFI is constantly directing unit employees' work.

Under current Board law, even routine supervision can establish joint-employer status where it is frequent. In *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991), the Board found joint-employer status based on the constant presence of site superintendents and the high degree of detailed awareness and control of the employees' daily activities. The putative joint employer regularly directed the employees to perform particular tasks and determined many of the specifications for the tasks. The constancy and level of BFI's control over the employees' day-to-day work overshadows that present even in *Quantum*. That BFI controls the unit employees' work through twice-daily shift meetings is also significant. *Cf. Martiki Coal Corp.*, 315 NLRB 476, 478 (1994) (finding joint employment in part because of the twice daily meetings between the user entity and the foreman of the supplier employer).

The Petitioner submits that BFI's exertion of authority over its operations - operations into which the unit employees are folded and intertwined - is sufficient to establish BFI's joint employer status. However, BFI also controls the manner in which the unit employees perform their day-to-day work and other essential terms and conditions of employment.

iii. BFI's Day-to-Day Control Over the Unit Employees Is Not "Routine;" BFI Controls the Manner of the Unit Employees' Work

BFI's control over the unit employees' day-to-day work is far from routine. Importantly, here, unlike the cases relied on by the Regional Director, the supervision and control exercised by BFI is directed towards *how* the unit employees perform their jobs, not where they perform otherwise independent functions (e.g., dispatching drivers as in *TLI*, *Lareco,* and *Teamsters Local 776*).

BFI has trained the unit employees in how to perform the work, including how to work on BFI's new machinery after it was installed approximately one year prior and *techniques* to use when sorting. BFI continuously trains and instructs unit employees (directly and indirectly) as to how to perform their job, including, *inter alia*, how they want the finished product to look, what to pick, techniques for picking, what to prioritize, how to clear jams where appropriate, and when to use the emergency stop. (Tr. 83:3-6; 83:19-21; 84:6-15; 84:24-85:1; 111:6-12; 112:17-113:2; 145:16- 146:3; 146:16-147:3; 147:4-12).

BFI controls the speed at which the employees work, through control of speed of the lines, staffing of the lines, and work rules. BFI's control over the speed of the work is an aspect of controlling how the employees perform the work. In combination with BFI's work rules regarding productivity, BFI dictates how unit employees should balance speed versus accuracy when completing the sorting work.

BFI constantly oversees the unit employees to ensure compliance with BFI's extensive specifications and directives. Where BFI supervisors observe deficiencies with unit employee work, BFI intervenes to correct those deficiencies as BFI deems appropriate by, for example, changing the speed or directing unit employees or shifting assignments. BFI exercises its discretion in managing the unit employees to meet its productivity standards. This is exactly the type of discretionary supervision that establishes joint employer status. *See, e.g., Computer Assoc. Int'l Inc.*, 332 NLRB 1166 (2000).

In *G. Heileman Brewing Co.*, 290 NLRB 991, 999 (1998), the Board found joint-employer status, noting that the supervisory personnel "supervised and directed the work of the employees to the extent that it determined that such supervision and direction were necessary." As in *Heileman*, the critical fact is that BFI intervenes where necessary. *See also Sun-Maid Growers of Cal.*, 239 NLRB 346 (1978) *enforced* 618 F.2d 56 (9th Cir. 1980) (rejecting the concept that control over the "means" by which "the end" is achieved required "hover[ing]" and "directing each turn of their screwdrivers and each connection that they made.") Similarly, for the non-sorting positions, BFI directs these employees where necessary. In today's modern pan-optic workplace, "hovering" is no longer necessary; video cameras with feeds to a control room, coupled with walkie-talkies, as employed by BFI, allow this authority and control to be exerted from afar. Similarly, the unit employees that work as maintenance helpers spend the entire workday assisting the BFI maintenance employees subject to BFI's supervision.

For these reasons, the authorities relied upon by the Regional Director, in which the putative joint-employer exercised only "routine" control over employees' daily activities, are distinguishable. In *G. Wes Ltd. Co.*, 309 NLRB 225, 226 (1992), the putative joint employer did not control how the employees performed their work because the employees were skilled and certified asbestos abatement workers who worked offsite, without instruction or management of their workday. In contrast, here, BFI trains the unit employees and monitors the unit employees' performance for compliance with its training and productivity standards.

In *S. Cal. Gas Co.*, 302 NLRB 456 (1991), the user-employer contracted with a subcontractor to perform janitorial services to clean its facility. The manner in which these services were performed were not important to the user-employer, were not dictated nor monitored by it, and were not central or integrated into its business. As shown above, the

relationship between BFI and Leadpoint extends beyond the subcontracting of non-core operations during non-business hours as in *S. Cal. Gas*.[34]

In instances where facts more similar to those present here are considered, joint employer status has been found. For example, in *Pac. Mut. Door Co.*, 278 NLRB 854 (1986) the user-employer was a joint employer as a result of its ultimate direction and supervision over the employees and the control it exercised over their operation of its vehicles. This petition also parallels *Manpower, Inc.*, 164 NLRB 287 (1967), in which the Board found a joint employer relationship even though the supplier-employer was solely responsible for hiring, making required payroll deductions and providing workers' compensation insurance, whereas the user-employer exercised the authority to direct work and ensure it was accomplished. Here, the Regional Director distinguished these cases with erroneous factual findings (such as BFI does not mandate how many Leadpoint employees work on the line or the speed in which the Leadpoint employees work or where they stand on the material stream, or how they pick material and contaminates off of the material stream). (Decision, p. 17.) Theses errors of fact are significant because of the fact-intensive focus of the Board's analysis. *Boire v. Greyhound Corp.*, 376 U.S. at 481, 84 S.Ct. at 899.

BFI's constant supervision and direction over the manner in which unit employees work is sufficient to establish joint employer status. Petitioner submits that BFI cannot insulate itself from its collective bargaining obligation by inserting an intermediary level of supervision while retaining control over the day-to-day work of the unit employees as described in the full factual record. Moreover, other important indicia of BFI's control are present here.

[34] Also, in *Southern California Gas*, the union and the subcontractor janitorial company had a long history of collective bargaining, with bi-lateral collective bargaining agreements that had been negotiated without the user-employer's involvement, which further distinguishes the case from the facts present here.

b. BFI's control over other terms and conditions of employment establishes its joint employer status

BFI exercises its authority over many mandatory subjects of bargaining, as detailed above, including setting the shift times, overtime, proscribing the number of employees that work each day, staffing, job duties, overriding employee assignments, establishing and enforcing work rules, dismissing employees from the worksite, setting hiring criteria and influence over wages. Taken together, these facts establish that BFI codetermines the unit employees' essential terms and conditions of employment, especially when viewed alongside the evidence of BFI's control over the unit employees' day-to-day work.

BFI exercises complete discretion over what tasks are to be performed each day and how many unit employees are going to perform said tasks. (Union Exh. 2; Tr. 147:4-12; 296:10-297:5.) The fact that BFI dictates the number of employees working each day weighs in favor of a finding of joint employer status. *See, e.g., D&F Indus.*, 339 NLRB 618, 640 (2003); *Pac. Mut. Door Co.*, 278 NLRB 854, 858-59 (1986); *cf. Boire v. Greyhound Corp.*, 376 U.S. at 475, 84 S.Ct. at 896.

BFI's extensive control over the hours that unit employees work (including shift times, overtime and breaks) also tends to establish joint employer status. *See D&S Leasing*, 299 NLRB 658, 671 (1990); *Pac. Mutual Door Co.*, 278 NLRB 854, 859 (1986) *Quantum Resources Corp.*, 305 NLRB 759, 760-61 (1991); *G. Heileman Brewing Co.*, 290 NLRB 991, 1000 (1988).

BFI's authority to control which unit employees work at its facilities should also be considered here as exercising the right to exclude is tantamount to discharge from employment and is a means of exclusion from the bargaining unit. *See, e.g., Dunkin' Donuts Mid-Atl. Distribution Ctr., Inc. v. NLRB*, 363 F.3d 437, 440-41 (2004) (noting that the putative joint employer prevented the hiring of applicants that he did not approve); *Holyoke Visiting Nurses Ass'n*, 310 NLRB 684, 685-86 (1993) (finding joint employer status in part because the putative joint employer had the right to refuse to accept the services of employees it did not want, and could effectively recommend the removal of such employees from its premises); *Hamburg*

Indus., Inc., 193 NLRB 67, 68 (1971) (noting that the joint employer retained the right to remove employees from its plant). BFI has unfettered discretion to dismiss employees from the worksite and has exercised it on three occasions. The Respondents' agreement also reserves to BFI approval as to who is hired by Leadpoint. BFI and Leadpoint may argue that because BFI's authority is simply to dismiss Leadpoint-contracted employees from its premises (which effectively results in termination), that this is somehow determinative. Such an argument is contrary to the reasoning in *Holyoke*, as BFI's dismissal of an employee in this case results in dismissal from the bargaining unit and from the joint-employment relationship itself.

BFI indirectly controls the wages of the unit employees, as it sets a maximum wage rate and ultimately wage increases must be negotiated and authorized by BFI. *See Dunkin' Donuts Mid-Atl. Distribution Ctr., Inc. v. NLRB*, 363 F.3d 437, 440 (2004) ("Dunkin' Donuts also determined Aldworth employee wage and benefit rates by specifying, in the parties' 'cost-plus' lease agreement, the rates it would reimburse Aldworth.") BFI also sets and enforces work rules regarding safety and conduct and is responsible for the physical environment and the attendant occupational safety and health environment, all mandatory subjects of bargaining.

The facts presented here fall well-within existing authorities finding a joint-employment relationship. For example, in *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525 (9th Cir. 1968), the Ninth Circuit found that a department store owner and licensee jointly employed the licensees' workers because the store operator exercised authority similar to BFI's authority with respect to a number of employment conditions that are mandatory subjects of bargaining including setting store hours, proscribing the number of employees to operate each licensees' department, veto power over licensee hiring and regulated breaks. Similarly, in *Sun-Maid Growers of Cal.*, 239 NLRB 346 (1978) *enforced* 618 F.2d 56 (9th Cir. 1980), the Board found that a food processor and an electrical subcontractor were joint employers of the electricians because the food processor controlled the electricians' work schedules, assigned their work, and decided when additional electricians were needed. BFI, like the food processor and retail store, controls the unit

employees' schedules, work assignments and dictates the total number of employees on any given day.

In conclusion, joint employer status is a totality of the circumstances calculation. The joint employer need not exercise the full panoply of employer power. The above evidence is more than sufficient to establish BFI's joint employer status.

B. The Board Should Adopt a Broader Joint-Employer Standard to Effectuate the Purpose of the Act, and Conform with Prior Caselaw and Industrial Realities

The Board's current standard has been ever-narrowly construed and improperly focused on the extent of direct supervision exhibited by a user-employer over a supplier-employer's employees. That focus, which appears to have derived from a misapplication of master-servant agency principles, is not only unauthorized by the Act, but contradicts it. While nominally applying the same standard, over the past three decades the Board has increasingly refused to consider diverse indicia of a user-employer's control over the supplier-employees' working conditions. This doctrinal drift has narrowed the joint employer standard to the extent that it no longer shares fealty with the Act's terms or purpose. As such, the Board's approach is now contrary even to the common law standard for determining when an individual is employed by another, a standard approved by the Supreme Court. *See NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258, 88 S.Ct. 988, 991 (1968) (noting that the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.")

While the common law test is helpful, the Act is the Board's ultimate source of authority. As explained below, the Act requires the Board to consider not merely the indicia of control exerted over the employees by each employing entity, but also the relationship, and extent of control as between the two employing entities which necessarily requires consideration of indirect control. Section 9 of the Act, under which this proceeding arises, requires that these considerations be founded in authority over terms and conditions of employment, rather than control over the person - which has been the Board's recent pre-occupation.

Moving beyond the explicit terms of the Act, the Board's current analysis neglects to consider - indeed it ignores - industrial realities, including the atomization of labor and corresponding hierarchies of authority between employers. A consideration of industrial realities is a requisite to ensuring meaningful bargaining and fidelity to the obligations imposed by the Act. *Jewell Smokeless Coal Corp.*, 170 NLRB 392 (1968) ("considering the industrial realities of the coal mining industry, the conclusion is inescapable that Jewell is a necessary party to meaningful collective bargaining...."; finding joint employment even though one entity had no role in hiring, firing or direction of employees.)[35] Other agencies charged with enforcing workplace regulations have confronted the problems of enforcement created by the use of an intermediary labor supplier but, unlike the Board, they have shown sensitivity to changing industrial realities. The Board has moved in the opposite direction.

The Petitioner urges a return to the application of the joint employer standard that applies the terms of the Act and is harmonized with its purpose, as detailed below.

1. The Board's Current Pre-occupation with "Direct and Immediate" Control of Employees Conflicts with the Language and Purpose of the Act

The Board's current approach to joint employment is neither tethered to the Act's terms nor its articulated purpose. Rather, it focuses on an extra-statutory and narrow view of employment, founded in the mercantile master-servant relationship and, specifically, whether a master exhibits sufficient control to be liable for the torts of its servant. This makes little sense in the context of industrial labor relations, and makes even less sense in our current economy that increasingly involves atomized and decentralized supply- and labor-chain relationships. The modern worker is awash in a sea of multi-layered and dependent relationships, and the current joint employment standard leaves him or her bereft of meaningful resort to the protections and processes of the Act.

[35] This case has not been overruled; it has simply been ignored by later NLRB cases.

In Petitioner's view, a joint employment standard must be authorized by the text of the Act and situated within its confines. It must be adopted in order to effectuate the purpose of the Act, which is to regulate labor relations and facilitate collective bargaining, and thereby avoid disruptions to commerce. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964), quoting *Int'l Harvester Co.*, 138 NLRB 923, 925-926 (1962) ("The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining.")

This issue presented in this case arises from a representation petition, a proceeding authorized under section 9 of the Act. Statutory analysis must begin there. Section 9(a) affords employees the right to designate an exclusive representative for the purpose of collective bargaining. It makes no mention of employers. Indeed, it is drafted without regard to by whom the employees are employed, nor does it provide for employer input.

Rather, section 9(a) sets forth a single criterion, indicating that employees may combine in a unit that is "appropriate" for the purposes of collective bargaining. More significantly, section 9(b) indicates that section 9(a) is to be applied "in order to assure to *employees the fullest freedom* in exercising the rights guaranteed by this subchapter" (emphasis added). It is the Act's focus on employees' right to bargain, and ensuring the *fullest freedom* to do so, that must drive the Board's analysis.

Section 9(b) continues, providing that in order to ensure full freedom, "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision." To be sure, section 9(b) references "employer" in the singular, a fact that has been seized upon - without analysis - in a recent Board decision. *H.S. Care, LLC d/b/a Oakwood Care Ctr.*, 343 NLRB 659, 661 (2004) (stating, without considering of the Act's definitional section: "Thus, the text of the Act reflects that Congress has not authorized the Board to direct elections in units encompassing the employees of more than one employer").)

Yet, to divine the meaning of "employer" in section 9, a cross-reference to section 2 of the Act, its definitional section, is necessary. Under section 2(2) the term "employer" includes the plural. Although section 2(2) of the Act does not actually define the word "employer," it amplifies its meaning by declaring the term "includes any *person* acting as an agent of an employer, *directly* or *indirectly*." In turn, "person" is defined by section 2(1) to mean "*one or more* individuals, labor organizations, partnerships, associations, corporations…." In other words, a "person" includes the plural, and the term "employer" includes any "person" acting directly or *indirectly* on behalf of the employer.[36]

Principles of statutory construction require the Board to accord to these provisions the appropriate breadth contemplated by their use. *See, e.g., State Bar of New Mexico & Commc'ns Workers of Am. Local 7011,* 346 NLRB 674, 681 (2006) (NLRA's exemptions are construed narrowly and the term "employer" is applied broadly, which comports with the statutory language and the purpose of protecting and encouraging collective bargaining.); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891, 892, 104 S.Ct. 2803, 2808 (1984) (reasoning that the "breadth of 2(3)'s definition is striking: the Act squarely applies to 'any employee.' The only limitations are specific exemptions.")

Therefore the Act itself contemplates employees may be jointly employed by multiple entities by virtue of the entities' relationships with respect to each other, and not merely with respect to the exercise of direct control each distinct entity exercises over the employees. Such control, the Act indicates, may be direct or indirect.

[36] For this reason too, *H.S. Care* was wrongly decided. A single bargaining unit including user and supplier employees is authorized by Section 9 of the Act, provided the two employing entities are "persons" and have direct or indirect indicia of agency as to each other. Such a unit that includes both user- and supplier-employees is not a multiemployer unit as found by the *H.S.Care* Board. Rather, where community of interest extends across both groups of employees, Sections 9 and 2 of the Act authorize a single unit. See also Restatement (3rd) of Agency, intro. (2006) ("Doctrines within the common law of agency are formulated without regard to whether a person is an individual or a legal or commercial entity or other legally recognized nonindividual person, including an organization.")

Employer is defined in section 2(2) to include agents acting directly and indirectly. The Act does not limit employers to agents, but simply "includes" that category of relationship without excluding others. The concept of agency is particularly amorphous. The term "indirectly" manifests an extremely broad concept of agency. As stated in the recently-revised Third Restatement of Agency (2006), Introduction:

> The term "agency" has several distinct meanings. The common-law definition of a relationship of agency uses concepts, such as "manifestation" and "control," that embrace a wide spectrum of meanings and that in this application are highly fact-specific. As a result, agency law covers a broader set of relationships than might be expected. Manifestations may be made indirectly and in generalized ways, and legal implications do not necessarily depend on precise statements made to specifically identified individuals. Likewise, a principal's right of control, which entitles the principal to give interim instructions or directions to the agent, is a broadly drawn concept.

Here, the relationship between BFI and Leadpoint is markedly defined by BFI's right of control and exercise of control over Leadpoint. For that reason, the Board's focus on the master-servant relationship and preoccupation with the exercise of control over an employee is unauthorized by the Act.

To be sure, a nexus to collective bargaining is a component of the analysis, and Petitioner is not suggesting that, for example, a parts supplier that is a purchasing agent of an employer is a joint employer. There must be requisite nexus, which is supplied by the Act itself, that is, section 9(a) and the explicit purpose of ensuring employees exercise the bargaining rights secured by the Act to the *fullest extent*. If two statutory employers have a relationship involving direct or indirect control over the other, they are joint employers to the extent one, the other, or both, influence terms and conditions of employment such that they are necessary to ensure the principles of section 9(a) are effectuated.

In developing a test that is loyal to the Act, the Board must construe, in each instance presented, the indicia of direct or indirect authority or influence between the two putative employers. This proposed analysis is not intended to supplant the traditional formulation relating

to control over employees, of course that should be considered. Either analysis, taken together or separately, would establish a joint employer relationship provided sufficient influence over employees' terms and conditions of employment is present.

As between the putative joint employers, legal distinctions or contractual formulations are irrelevant. The relevant question is factual: to what extent the user-entity controls or has the right to control the supplier-entity with respect to its employees' terms and conditions of employment. Indeed, as noted in the Restatement (Second) of Agency at section 2(3) an entity can be an independent contractor of another entity and act as an agent: "An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent." Here, BFI's authority and right to control Leadpoint in matters affecting the Leadpoint employees' terms and conditions of employment is nearly absolute. The Agreement between the parties provides BFI authority over Leadpoint and its employees in various ways. BFI issues instructions to its supervisors, who are required to comply. The factual record is replete with additional indications of control and influence among the entities, as described above.

These concepts were implicitly recognized in the Board's initial formulation of joint employment with respect to two employers who "share or codetermine" terms and conditions of employment. However the Board's later focus - and preoccupation - on the exertion of direct control over the employees by each employer is evidently at odds with Act and the principles that inform it. The Board has previously considered these industrial realities, and the fact of indirect control and the relationship between the joint employers themselves. See *Jewell Smokeless Coal Corp.*, 170 NLRB 392 (1968); *United Stores of Am.*, 138 NLRB 383 (1962); *Gallenkamp Stores v. NLRB*, 402 F.2d 525 (9th Cir. 1968). The Board should begin to do so again, because the Act requires it.

2. The Board Must Consider All Indicia of Control in Its Joint Employer Analysis

The Board's current joint employer standard is the result of *ad hoc* doctrinal pronouncements, made without consideration of the terms of the Act or its purpose. Its roots, when traced, are surprisingly shallow, with no authority, citation or policy considerations to sustain them. The joint employment concept, initially framed, is plausible enough when summarized as when "two separate entities share or codetermine those matters governing the essential terms and conditions of employment" and each joint employer must "meaningfully affect[] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *TLI*, 271 NLRB 798 (1984). The first sentence of this standard was articulated in *NLRB v. BFI*, and derives from *Greyhound Corporation*, 153 NLRB 1488, 1495 (1965) *enforced* 368 F.2d 778 (5th Cir. 1966). The second sentence is evidently an attempt to explain what the *Greyhound* Court meant by "essential terms and conditions of employment," and was added by *TLI* and *Laerco* without citation, explanation or justification. However, the Board has uncritically and reflexively applied this second sentence literally, although it was clearly intended to be expositive and not dispositive. *Laerco*, 269 NLRB at 325. As the term "such as" indicates, the list related to "hiring…direction" was not intended to be exhaustive and, indeed, the *Greyhound* standard specifically applies to all "matters *relating* to the employment relationship." In practice the Board has applied the reference to "hiring, firing, and supervision" as a litmus test in which no other indicia of control are relevant.

Worse still, the Board has applied a standard of "immediateness" and "directness" to these already limited criteria. The current standard now requires that a joint-employer must exercise "direct" and "immediate" supervision rather than "limited" or "routine." *AM Prop. Holding Corp.*, 350 NLRB 998, 1001 (2007) (finding no joint employment relationship because the supervision by the user-employer was "limited and routine"); *see also SEIU Local 254*, 324 NLRB 743, 749 (1997). In recent years the Board has further affirmed this standard without consideration of, or in disregard regard to, any statutory underpinnings. Thus, in

Airborne Freight Co., 338 NLRB 597, 597, n.1 (2002), the Board described the "essential element" of joint-employment as "whether a putative joint employer's control over employment matters is direct and immediate." Although the Board cited *TLI,* 271 NLRB at 798-799, for this second proposition, the terms "direct and immediate" and "essential element" do not appear anywhere in the *TLI* decision. It is unclear where the "direct and immediate" requirement comes from or why it should be a consideration. This singular focus on direct and immediate supervision is a shibboleth of agency law,[37] is anachronistic, has no place in collective bargaining, and is contrary to the terms of the Act.

It has been noted that the Board has never articulated a justification for this narrow standard. *See, e.g. Airborne Freight Co.*, 338 NLRB 597, 597 (Liebman, concurring) ("But I question [the joint employer] standard, which has evolved without a full explanation of why it was chosen, without careful exploration of possible alternatives (including approaches that were silently abandoned), and without a clear acknowledgement of the consequences.")

This focus on "direct and immediate" supervision improperly ignores the practical realities of the workplace and the context-specific doctrines the Board normally adopts. The joint employer analysis must be responsive to the particular facts of the workplace and the level of supervision necessary to control terms and conditions of employment. The level of control necessary may be routine or incidental. *Cf. McGuire v. US*, 349 F.2d 644, 646 (9th Cir. 1965) ("The absence of need to control should not be confused with the absence of right to control. The right to control contemplated by ... the common law as an incidence of employment requires only such supervision as the nature of the work requires.")

[37] Which is intended to differentiate between a servant and an independent mercantile workman. Thus a servant requires direct supervision by the master. *Cf.* Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. Rev. 329, 334-35 (1998) ("As a test for determining which workers should be able to bargain collectively with a firm whose interests they advance, however, it makes no sense at all. It means that any workers whose "manner and means" of work are not under the direct control of the firm that compensates them cannot bargain collectively with that firm, regardless of either the importance of their labor to the productivity of the firm's capital or the lack of any individual bargaining leverage possessed by the workers.").

Where the work is repetitive and unvaried, constant observation and supervision by both entities is not necessary. Although a user-employer's supervision may be "limited" or "routine," it may still control the employees' day-to-day work. *See Breaux and Daigle, Inc. v. U.S.*, 900 F.2d 49, 52 (5th Cir. 1990) ("the degree of control necessary for a particular endeavor is of necessity commensurate with the task. Picking crabs is a simple task that does not require much supervision.") Further, the Board's focus on direct control over the manner in which work is performed is a vestige of the independent contractor-employee distinction that has no place in the analysis of the control between two entities over statutory employees' terms and conditions of employment.

The Board's uncritical determination that the "essential terms of employment" equates with hiring, firing… supervision" and "direct and immediate" supervision of employees, is not only exceedingly narrow, and contrary to the terms of Section 9, but it is improperly paternalistic. The standard presupposes the "essential" conditions of employment with which employees are most concerned. Yet the Act does not presuppose the interests of employees, but leaves that to processes of self-determination and the mechanism of collective bargaining. It makes little sense that a joint employment standard should focus on such a narrow bandwidth in determining the influence necessary to establish a joint employment relationship, when a myriad of other essential terms that are mandatory subjects of bargaining may be also be pertinent to the employees involved. *Cf. Management Training Corp*., 317 NLRB 1355 (1995) ("whether there are sufficient employment matters over which unions and employers can bargain is a question of fact better left to the parties at the bargaining table and, ultimately, to the employee voters in each case.") Describing this concept further, the Board in *Management Training Corp.* reasoned:

> [W]e think the emphasis in *Res-Care* on control of economic terms and conditions was an oversimplification of the bargaining process. While economic terms are certainly important aspects of the employment relationship, they are not the only subjects sought to be negotiated at the bargaining table. Indeed, monetary terms many not necessarily be the most critical issues between the

> parties. In times of downsizing, recession, low profits, or when economic growth is uncertain or doubtful, economic gains at the bargaining table are minimal at best. Here the focus of negotiations may be upon such matters as job security, job classifications, employer flexibility in assignments, employee involvement or participation and the like."

Id. at 1357. Here, the terms over which BFI exercises significant control, both directly and indirectly, all relate to core subjects of bargaining and virtually define the unit employees' terms and conditions of employment. Moreover, the safety concerns at a worksite such as the Recylcery[38] involving heavy machinery and the processing of waste are purely within the control of BFI. *Minnesota Mining Co*., 261 NLRB 27, 29 (1982) *enforced* 711 F.2d 348 (D.C. Cir. 1983) ("Few matters can be of greater legitimate concern to individuals in the workplace, and thus to the bargaining agent representing them, than exposure to conditions potentially threatening their health, well-being, or their lives.")

The Board's current, narrow formulation of its joint-employment standard is an accident of poorly reasoned decisional law predicated on irrelevant and anachronistic principles of master-servant control. As exemplified in this case, with respect to the unit employees, Leadpoint functions as little more than BFI's taskmaster, as BFI has essentially subcontracted the direct supervision of its workforce, but not its control over them.

3. Cost-Plus Labor-Only Contracts that are Terminable at Will Necessarily Exhibit the Indicia of Joint Employment as to the Employees Whose Employment is Governed by Their Terms

The nature of the agreement between BFI and Leadpoint, a labor-only, cost-plus contract, ensures BFI's control over the unit employees' work and wages. In the past, the Board has recognized the reality of these arrangements. See *Hoskins Ready-Mix Concrete, Inc*., 161 NLRB

[38] The recycling industry is particularly perilous. In 2001, the nonferrous recycling industries in the United States employed 16,000 individuals and in turn suffered 3,000 cases of injuries and illnesses. OSHA Publication 3348-05 (2008), citing Bureau of Labor Statistics. In 2005, the injury rate for various recycling industries "range[d] from 7.8 to 11.2 per 100 employees...." *Id*. Representative injuries range from "[a] 46-year-old laborer [who] died from injuries sustained when his left arm became caught between the belt and pulley of a conveyer system" (NIOSH FACE, 94MA021) to "[a] 52-year-old welder [who] was crushed to death by a hydraulic door on a scrap metal shredder" while "attempting to remove a jammed piece of metal." (NIOSH FACE, 02CA004).

1492, 1493 (1966) (joint employment "on the fact that General is obligated under the operating agreement to reimburse Hoskins for payroll expenses, and therefore General would be the ultimate source of any wage increases for Hoskins' employees that might be negotiated with a union."); *Indus. Personnel Corp. v. NLRB*, 657 F.2d 226, 229 (8th Cir. 1981) (enforcing joint employer finding, "while [the supplier] sets the drivers wages, [the user] reimburses [the supplier] and presumably has some control over those wages since it can rescind the [service] contract on thirty days notice."); *San Marcos Tel. Co*., 81 NLRB 314, 316-18 (1949) (holding that a client was a joint employer when it reimbursed accountants for the wages paid to and expenses incurred by clerks); *Sierra Madre-Lamanda Citrus Ass'n*, 23 NLRB 143, 150 (1940) (finding that a fruit grower who controlled the packing houses in which the employees worked and "supplied the money with which they were paid" was a joint employer); *Solvay Process Co*., 26 NLRB 650, 653-56 (1940) (finding that a company which hired a contractor on a cost-plus basis was a joint employer because it "owned and managed the plant in which the employees worked [and] was the sole source of money with which [the contractor] paid them").

As in *Hoskins*, BFI reimburses Leadpoint for labor costs and, therefore, is the ultimate source of any wage increases to the unit employees. This is not simply theoretical. The one wage increase that unit employees received - in order to comply with a local minimum wage law - required BFI's agreement. Further, BFI's agreement with Leadpoint places an explicit ceiling on the wage rates of unit employees. If this is not direct control, it certainly is indirect control as to both the unit employees and Leadpoint's labor relations. *See Floyd Epperson*, 202 NLRB 23 (1973) *enforced* 491 F.2d 1390 (6th Cir. 1974) ("While Epperson hires the drivers and determines their rates of pay, United, through increases to Epperson, has some indirect control over their wages.")

The reservation of control by contract or otherwise has been, in prior decisions, a factor in determining an employment relationship in common law. Thus the Supreme Court has in principle rejected the Board's now-narrow focus on direct, non-routine and immediate

supervision, because it is contrary to common law principles. The common law test, founded in agency, has always considered the "right to control" as opposed to evaluating *actual* control. *See* Restatement (Second of Agency), section 220 (1). In recognition of this, under prior Board precedent, the reservation of control by contract, whether or not it is currently exercised, has been a pertinent and controlling factor. *See, e.g., Cabot Corp.*, 223 NLRB 1388 (1976) ("Whether [user] and [supplier] were joint employers depends upon the amount of actual and potential control that [user] had over [the employees in question]. This in turn, to a certain extent, is dependent upon the amount and nature of control that [user] exercised and was authorized to exercise under the contract."); *Globe Discount City*, 171 NLRB 830, 832 (1968) ("[s]ince [the user] retains the right to terminate either [supplier] for default, it has insured that its wishes in regard to labor relations matters will be carried out by the licensees."); *Taylor's Oak Ridge Corp.*, 74 NLRB 930, 932 (1947) ("That the employer's power of control may not in fact have been exercised is immaterial, since the right to control, rather than the actual exercise of that right, is the touchstone of the employer-employee relationship."); *Thriftown, Inc*., 161 NLRB 603, 607 (1966) ("[s]ince the power to control is present by virtue of the operating agreement, whether or not exercised, we find it unnecessary to consider the actual practice of the parties regarding these matters as evidenced by the record."); *see also Hoskins Ready-Mix Concrete, Inc.*, 161 NLRB 1492, 1493 and n.2 (1966); *Bethlehem-Fairfield Shipyard., Inc*., 53 NLRB 1428, 1431 (1943); *Gen. Motors Corp. (Baltimore, Md.)*, 60 NLRB 81, 83 (1945); *Jewel Tea Co.*, 162 NLRB 508 (1966); and see *Browning-Ferris*, 91 F.2d at 1123 (joint-employer finding "is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer.")

The Board has provided no rationale for deviating from considering the right to control found in the common law test, and instead only considering the exercise of "direct and immediate" supervision.

As noted above, the Board's prior approach of considering the control of the user entity to constrain meaningful bargaining between the supplier employer and the unit employees over wages comports with the practical realities of the workplace.[39] Unfortunately, and despite this precedent, in *The Goodyear Tire & Rubber Co*., 312 NLRB 674, 678 (1993), the Board adopted a stance that rejects consideration of the cost-plus arrangement because, it was concluded, doing so would result in inappropriate joint-employer finding in all cost-plus labor-only arrangements. There is no more reason to justify refusing to consider such an arrangement as a factor as there would be to adopt a bright-line test favoring joint employment under such arrangements. The nature of the contractual agreement between the user and labor-supplier evidences the control reserved by the user as to the supplier, and is therefore not only pertinent, but critical to the joint-employment analysis.

4. The Board's Exception Predicated on "Premises Liability" Is Without Reasonable Justification and Contrary to the Act and Past Precedent

The Board has carved-out additional exceptions from its already narrowly-defined standard. Here, the Regional Director rejected evidence indicating BFI's level of control under a "premises liability" doctrine. E.g. *Hychem Constructors, Inc.*, 169 NLRB 274 (1968); *S. Cal. Gas Co.* 302 NLRB 456 (1991). This doctrine sounds in the tort of negligence and the duty an owner of property owes to its invitees and customers. Although both Respondents have vigorously argued its application here to justify BFI's exercise of control over Leadpoint's

[39] See, e.g., Freeman & Gonos, *Taming the Employment Sharks: The Case for Regulating Profit-Driven Labor Market Intermediaries in High Mobility Labor Markets*, 13 Empl. Rts. & Employ. Pol'y 285, 301 (2009) ("Thus for most temp workers, real bargaining power to affect the wages they are offered - what the NLRA aptly refers to as the 'actual liberty of contract' of employees - is practically nil. The client firm's bottom line - what it is willing to pay the temp agency - effectively dictates the maximum wage that the agency is willing to pay its temps, since the staffing firm has little or no ability or inclination to absorb wage increases not backed by the client firm.")

employees, applying this doctrine makes no sense where the "invitees" are the very employees performing the essential work of the employer's business.

The doctrine may be appropriate where the workers involved are independent contractors, or the workers' respective employer's relationship with the owner of the premises has no indicia of joint employment (for example, a contractor engaged for a specified engagement to perform a function unrelated to the business, such as construction or repair), but it is not a relevant criterion on which to evaluate joint employment. Restatement (Third) Of Agency § 2.04 (2006) ("In general, employment contemplates a continuing relationship and a continuing set of duties that the employer and employee owe to each other. Agents who are retained as the need arises and who are not otherwise employees of their principal normally operate their own business enterprises and are not, except in limited respects, integrated into the principal's enterprise so that a task may be completed or a specified objective accomplished.")

Like other aspects of the Board's joint employment analysis, this "premises liability" exception has been adopted without clear explanation. In *Hychem Constructors, Inc,* and *S. Cal. Gas*, the Board provided no reasoning to explain why evidence of control should be rejected on the basis of general principles of negligence. This is especially true where the authority exercised by the user-employer is broader than is required under the duty of care applicable to invitees (and where it implicates mandatory subjects of bargaining). For example, here the Regional Director did not consider the fact that BFI's reservation of the right to have unit employees dismissed provided for "any reason or no reason." This reservation of authority is not limited to instances where the need arises as to ensure safety to invitees and customers.

Further, application of principles of "premises liability" fails to consider functional and industrial realities of the workplace. Courts that apply joint employer standards under other federal statutes, also informed by the common law test of employment, consider the fact that the employees work on the user-employer's premises as a salient factor in finding joint employment. See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (Supreme Court

considers, amongst several issues, the fact that "the premises and equipment of Kaiser were used for the work."); *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997) (in determining joint employer, consider, "whether the 'premises and equipment' of the employer are used for the work"); *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 69 (2d Cir. 2003) ("the shared use of premises and equipment may support the inference that a putative joint employer has functional control over the plaintiffs' work"). In *Torres-Lopez*, the Ninth Circuit reasoned, "grower's ownership of farmland is relevant 'for the obvious reason that without the land, the worker might not have work, and because a business that owns or controls the worksite will likely be able to prevent labor law violations, even if it delegates hiring and supervisory responsibilities to labor contractors.'" *Id*. (citations omitted); *see also Antenor v. D & S Farms*, 88 F.3d 925, 937 (11th Cir. 1996) (same).

Further, in prior Board decisions, the reservation of the right to exclude employees from the workplace was rightly considered to be evidence of a joint employment relationship. See *General Motors Corp.*, 60 NLRB 81 (1945) (user's ability to recommend discharge, though not exercised, was evidence of joint employer relationship); *Solvay Process Co.*, 26 NLRB 650 (1940) (finding joint employer status in part because the client owned and managed the plant in which the employees worked); *West Texas Utils. Co.*, 108 NLRB 407, 414 (1954) (holding that a contractor who prohibited a union organizer from working on its property was an employer because it controlled a "significant aspect of the employment"); *Sierra Madre-Lamanda Citrus Ass'n*, 23 NLRB 143, 150 (1940) (holding that an owner of packing houses who had the power to object to certain employees and prevent them from working on the premises was their joint employer).[40]

[40] This fact has been considered persuasive by the Circuit Courts, as well. *See, e.g., Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993) ("Holyoke demonstrated its joint control of the referred employees by, inter alia, its unfettered power to reject any person referred to it by O'Connell, Inc., and its substantial control over the day-to-day activities of the referred employees."); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir.1985) (employer was a joint employer in part because it exercised substantial day-to-day control over referred employees, consulted with referral agency over wages and fringe benefits, had the authority to reject an employee and could direct referral company to remove an employee); *Ace-Alikire Freight Lines, Inc. v. NLRB*, 431 F.2d 280, 282 (8th Cir. 1970).

The Board's approach in these earlier cases is more consistent with the intent of the Act - to promote collective bargaining to achieve industrial peace - and properly places the focus of the joint employer test on the fact of control and the reservation of authority as between the entities themselves. Where BFI has the right to demand the termination of Leadpoint's employee, that is persuasive evidence of a direct degree of agency between the two entities. The motivation of BFI's request for dismissal of Leadpoint's employees, whether it is the result of a concern over "premises liability" or for any other reason, is neither germane nor pertinent under Board law. Indeed, BFI's exercise of such a right over its own employees is not limited (absent an obligation to bargain), and therefore BFI is treating the unit employees as it would its own. In that regard the Board' "premises liability" exception presents a distinction without a difference.

C. The Board Should Adhere to a Multi-Factor Test that Includes the Degree of Direct and Indirect Control Between the Employing Entities

The Board's current standard allows the user entity to evade direct employment relationships and, therefore, evade its obligations under the Act. As stated above, any standard adopted by the Board must be situated within the Act itself, and particularly section 9. Thus a joint-employment standard's primary focus must be to effectuate meaningful collective bargaining. It must take account of the economic or industrial realities of the workplace, and the relationship - and level of control or authority - between the respective employing entities as well as towards the employees.

Petitioner urges a joint employer standard as follows: An employer is considered to jointly employ a unit of employees when it possesses sufficient authority over the employees or their employer such that its participation is a request to meaningful collective bargaining. Such authority can be either direct or indirect.

This standard must take into account a properly broad view of collective bargaining, not merely the negotiation of agreements, but also the adjustment of employee grievances with

respect to their working environment.[41] Necessarily, to apply the standard, preliminary criteria must be met, for example:

1. Are the supplier-employers' workers employees?
2. Are both the user-employer and the supplier-employer "persons" under the Act?
3. Does the user-employer either exercise or retain control or direction over the supplier-employer with respect to its operations?
4. Does the user-employer's exercise or retention of control over the supplier-employer implicate terms and conditions of the supplier-employees' employment?

Where these questions are answered in the affirmative, meaningful collective bargaining can not be accomplished without the involvement of the user-employer, and the Act requires a finding of joint employer status.

These considerations are not intended to supplant a consideration of the putative joint-employers' sharing or co-determination of terms and conditions of employment, but is intended to augment the analysis. Clearly a finding of sharing or co-determination would satisfy the proposed standard.

This standard returns the essential purpose of the Act, as the "fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act." *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939). More importantly, the proposed standard is authorized by the Acts statutory prescriptions of sections 2 and 9.

[41] It is a foundational principle of labor relations that "[t]he adjustment of grievances is as much a part of the process of collective bargaining as the negotiation of an agreement" and "[i]t is part of the function of a collective bargaining representative, and the employer has the same duty to bargain collectively over grievances as over the terms of the agreement." *Ostrofsky v. United Steelworkers of America* (D. Md. 1959) 171 F.Supp. 782, 790 aff'd, (4th Cir. 1960); 273 F.2d 614; *Conoco, Inc*., 287 NLRB 548 (1987).

IV. CONCLUSION

For the foregoing reasons, Petitioner urges the Board to reconsider the joint employer standard and adopt a standard that is authorized by the terms of the Act and effectuates its purpose. Under either the current standard or a broader standard, BFI jointly employs the unit employees, and the Regional Director's decision should be reversed.

Dated: June 26, 2014

BEESON, TAYER & BODINE, APC

By: /s/Susan K. Garea
SUSAN K. GAREA
Attorneys for Teamsters Local 350

PROOF OF SERVICE

NATIONAL LABOR RELATIONS BOARD

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Beeson, Tayer & Bodine, 483 Ninth Street, 2nd Floor, Oakland, California 94607. On this day, I served the foregoing document:

PETITIONER'S OPENING BRIEF IN SUPPORT OF REVIEW OF THE ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

☐ By Mail to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Beeson, Tayer & Bodine, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Oakland, California.

☐ By Personal Delivering a true copy thereof, to the parties in said action, as addressed below in accordance with Code of Civil Procedure §1011.

☐ By Overnight Delivery to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business for delivery the following day via United Parcel Service Overnight Delivery.

☐ By Facsimile Transmission to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(e).

☒ By Electronic Service. Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, June 26, 2014.

/s/Esther Aviva
Esther Aviva, Legal Secretary